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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-681

DONALD WALLACE, MICHAEL MCLAUGHLIN, *et al.*,

Petitioners,

—v.—

MICHAEL KERN, THE LEGAL AID SOCIETY, THE PEOPLE OF THE CITY AND STATE OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL MEMORANDUM

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PETITIONERS' SUPPLEMENTAL MEMORANDUM

Petitioners submit this supplemental memorandum pursuant to Rule 24(5) in order to call this Court's attention to a case recently decided in the Court of Appeals for the Seventh Circuit which squarely conflicts with the decision rendered by the Court of Appeals for the Second Circuit in the case at bar.

John v. *Hurt*, 14 Cr.L.Rep. 2239 (7th Cir., No. 73-4547, November 16, 1973),* was a suit brought *pro se* by an inmate of a state prison for damages against a public defender claiming a denial of Sixth Amendment rights and asserting federal jurisdiction under 42 U.S.C. §1983.

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* Because the Circuit Court of Appeals Opinion is not yet reported and to assist the Court in arriving at a determination of this petition, a copy of the Opinion is annexed as Appendix A.

The district court concluded that there were no facts pleaded by which defendant could be said to have acted under color of state law. The Court of Appeals reinstated the appeal, and considering it on the merits disagreed, stating:

> "It is at least arguable that a public defender acts under color of state law in his relationship with and representation of an indigent accused person. Although we recognize that after appointment in a given case, the professional relationship of the public defender with his client is similar to that of a private attorney with his client, the public defender ordinarily enjoys continuing employment by a unit of government, is often furnished an office as well as compensation, and appears to his client, as well as others, as a person cloaked with the authority of the state." (3a)**

The Court of Appeals went on to affirm on another ground, "that public defenders, like state prosecutors, and state and city attorneys, enjoy a qualified immunity for acts performed in the discharge of their official duties." (4a). The court felt that this extension of common-law immunity was needed to protect professional discretion and to aid in the recruitment of able attorneys for public defender work. The immunity doctrine is irrelevant to the instant action, which seeks no damages but only declaratory and injunctive relief. Petitioners do not question the discretion of individual Legal Aid attorneys but the manner in which the Society performs its constitutional mandate. In fact, it is intended to make it easier for attorneys to exercise their discretion to the fullest extent,* which pre-

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* See Appendix, Petition for a Writ of Certiorari, 29a-30a, 37a [Memorandum Opinion, United States District Court, Eastern District New York, (May 10, 1973) (Judd, J.)]

** References are to Appendix A to Petitioners' Supplemental Memorandum.

sumably would make Legal Aid service more attractive to competent attorneys.

The jurisdictional reasoning of *John* v. *Hurt* is clearly at variance with the perfunctory statement of the Court of Appeals in the instant case, which found no state action in the court's assignments of counsel to indigent defendants. Had the *John* court followed the reasoning of the Second Circuit Court of Appeals, it would never have reached the issue of immunity.

In a nation where fully two-thirds of all criminal defendants are indigents the problem of federal jurisdiction over state programs of representation of the criminal indigent is a recurring one. The recent flurry of circuit and district court opinions on this issue demonstrates that it is ripe for decision by this Court. In *Gardner* v. *Luckey*, —— F.Supp. ——, (M.D. Fla., No. 71-561, Civ. T/K, January 24, 1973), the District Court held that a public defender does not act under color of state law; an appeal is now pending before the Fifth Circuit Court of Appeals, (No. 73-1777, argued November 12, 1973). A similar action has recently withstood a motion to dismiss in the Northern District of Indiana, *Noe* v. *County of Lake*, (Civ. No. 73-H-157, November 1, 1973).* [This decision has not been appealed.]

Petitioners have shown the importance of this question in their petition. *John*, and the cases cited above underscore its significance. Action by this Court is necessary to resolve and clarify the law in this area, and to assure petitioners their right to a federal forum for their sub-

* A related question of federal jurisdiction over a publicly appointed attorney was at issue in *United States* v. *Senak*, 477 F.2d 304 (7th Cir. 1973), cert. denied, 94 S.Ct. 157 (1973).

stantial claims under the Sixth Amendment and the decisions of this Court.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

November 16, 1973.

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. WILBUR F. PELL, JR., *Circuit Judge*

No. 73-1547

EDWARD JOHN,

Plaintiff-Appellant,

—vs.—

ALBERT HURT,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

James L. Foreman, *Judge.*

Civil 73-103-E

ORDER

Plaintiff appealed from a judgment dismissing his complaint. Although the appeal was once dismissed, we confirm our order of October 12, 1973, reinstating the appeal,

and consider it on its merits, but without oral argument. Rule 2, F.R.A.P. Plaintiff's application for appointment of counsel is denied.

Plaintiff is an inmate of a state prison and is not represented. He sent his "complaint," "affidavit in forma pauperis," and other sheets of paper, variously entitled, to the district court. His pleading is to be held "to less stringent standards than formal pleadings drafted by lawyers" and the test is whether "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)." *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972), reh. denied, 405 U.S. 948.

The district court permitted filing in forma pauperis, but dismissed on the court's own motion without service of process on defendant. The district court concluded that there were no facts pleaded by which defendant could be said to have acted under color of state law.

Reading plaintiff's papers together, plaintiff alleged that defendant incompetently represented him as a "court appointed attorney" in a burglary trial before a state court; that plaintiff was found guilty and sentenced to imprisonment; that "defendant is clothed with the authority of state law"; that he deprived plaintiff of sixth amendment rights by giving plaintiff incompetent counsel; and that specifically defendant failed to move to suppress damaging evidence which was introduced at trial, failed to call all witnesses in plaintiff's behalf, and made statements in argument to the jury which involved plaintiff in the charge.

It is now clear, as a result of plaintiff's later submissions, and a letter from defendant to this court concerning the appeal, that defendant was the Public Defender of

Macon County, Illinois. In fairness to the district court it must be noted that plaintiff's original papers never expressly referred to defendant as public defender, although the caption of the complaint indicated his address as "Macon County Courthouse Decatur Illinois."

It is at least arguable that a public defender acts under color of state law in his relationship with and representation of an indigent accused person. Although we recognize that after appointment in a given case, the professional relationship of the public defender with his client is similar to that of a private attorney with his client, the public defender ordinarily enjoys continuing employment by a unit of government, is often furnished an office as well as compensation, and appears to his client, as well as others, as a person cloaked with the authority of the state. See, in the context of a criminal charge against a public defender acting under color of law, *United States* v. *Senak*, 477 F.2d 304 (7th Cir., 1973).

Assuming that defendant, as public defender, was acting under color of state law, plaintiff would still have to establish that defendant subjected him to the deprivation of a sixth amendment right. Looking at the complaint with required liberality, we can not say with assurance that plaintiff can adduce no facts to prove that defendant's alleged failures turned the state trial into a "sham or mockery" or at least "blotted out the essence of a substantial defense." *United States ex rel. Little* v. *Twomey*, 477 F.2d 767, 773 (7th Cir., 1973); *Scott* v. *United States*, 427 F.2d 609, 610 (D.C. Cir., 1970).

Assuming, however, that defendant could be deemed to be acting under color of state law, and allowing for the possibility that plaintiff's proof might demonstrate such

incompetency as to amount to deprivation of sixth amendment rights, we think that, as a matter of law, defendant is immune from liability for damages, and plaintiff's complaint must fail.

The legislative history of 42 U.S.C. §1983 does not indicate that Congress intended to "abolish wholesale all common law immunities." *Pierson* v. *Ray*, 386 U.S. 547, 555 (1966). In part because of the same factors which lead us to think that state subsidized and appointed public defenders can act under color of state law, we conclude that public defenders, like state prosecutors, and state and city attorneys, enjoy a qualified immunity for acts performed in the discharge of their official duties. *Brown* v. *Joseph*, 463 F.2d 1046, 1048 (3rd Cir., 1972), *cert. denied*, —— U.S. ——. See *Arensman* v. *Brown*, 430 F.2d 190, 193 (7th Cir., 1970). We note that the extension of immunity to public defenders will encourage their free exercise of discretion in the performance of professional obligations, as well as aid in the recruitment of able men and women for public defender positions. See *Brown* v. *Joseph*, supra at 1048-49.

As contrasted with the indictment in *United States* v. *Senak*, supra, there are no factual allegations in the complaint at bar, even when construed broadly, which indicate that the acts complained of fall beyond the scope of defendant's immunity. In deciding whether to object to evidence, whether to call a particular witness, and how to address the jury, the public defender was performing acts within the scope of his employment. Although it may be established under the pleadings that defendant made gross errors of judgment, we note that there is no allegation that his conduct was intentionally harmful to plaintiff,

or otherwise deliberately inconsistent with his obligation to plaintiff so as to be a voluntary exercusion outside the scope of his duties. See *Hilliard* v. *Williams*, 465 F.2d 1212, 1218 (6th Cir., 1972), *cert. denied*, 409 U.S. 1029.

Accordingly, the clerk of this court is directed to enter judgment affirming the judgment appealed from.